89-1110

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION and GERALD KRESS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED *

1. Whether the decision of the Court of Appeals in this case conflicts with this Court's decision in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978).

2. Whether the Department of Justice attorneys who prosecuted this case violated the provisions of the Inspector General Act of 1978, 5 U.S.C. App. 3, § 1, *et seq.*, by causing the Department of Defense Inspector General to issue administrative subpoenas for the purpose of gathering evidence for use in a pending criminal prosecution.

3. Whether the Department of Justice attorneys who prosecuted this case violated the requirements of the Federal Rules of Criminal Procedure by resorting to use of an administrative subpoena for the express purpose of avoiding the grand jury secrecy provisions of Rule 6(e).

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* The names of all parties appear in the caption. There are no parent companies or non-wholly owned subsidiaries of the corporate party.

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IN THE

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No. _____

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION and GERALD KRESS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Educational Development Network Corporation and Gerald Kress pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the opinion and judgment of that court in *United States of America v. Educational Development Network Corporation and Gerald Kress.*

OPINIONS BELOW

The opinion of the court of appeals is reported at 884 F.2d 737 and is set forth in the Appendix at 1a. The opinions of the district court are unreported and are set forth in the Appendix at 16a and 18a.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1989. A timely Petition for Rehearing *en*

banc was denied on October 17, 1989, and the court's order is attached in the Appendix at 23a. The Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1). This petition is filed within 90 days of the denial of the Petition for Rehearing and is timely under Rules 13.1 and 13.4 of the Rules of this Court effective January 1, 1990.

STATUTORY PROVISIONS

This case involves the interpretation and application of the Inspector General Act of 1978, 5 U.S.C. App. 3, § 1 *et seq.* ("IG Act") Section 6(a)(4) of that Act, which is set forth in full in the Appendix at 25a, provides that each Inspector General is authorized:

> to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act. . . .

Section 6(a)(4) of the Act further provides:

> In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of federal criminal law.

This case also involves Fed. R. Crim. P. 6(e)(2). The rule, which is set forth in full in the Appendix at 62a, provides in pertinent part:

> (e)(2) General Rule of Secrecy: A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph 3(a)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

STATEMENT OF THE CASE

This case involves a deliberate decision by the United States Attorney to sidestep the grand jury and its attendant safeguards and to gather evidence for use in a criminal prosecution by directing agents of the Department of Defense ("DOD") Inspector General to issue an Inspector General subpoena ("IG subpoena"). The subpoena compelling the production of the documents that formed the basis of the indictment in this case was issued after the matter had been brought to the attention of the Department of Justice and after steps had been taken to initiate grand jury proceedings. Since Fed. R. Crim. P. 6(e) would have barred the sharing of information between prosecutors, DOD investigators, and the United States Army Criminal Investigation Division, the United States Attorney decided not to ask the grand jury to issue subpoenas. Instead, the prosecutors directed agents of the DOD Inspector General to exercise the subpoena power granted in the IG Act of 1978.

Department of Justice officials including Assistant United States Attorneys have no authority of their own to compel the production of documents except through the grand jury. By effectively loaning his subpoena power to another agency, the DOD Inspector General exceeded the scope of his statutory authority. And, by orchestrating this effort to evade the grand jury process and contravene the legislative intent behind the IG Act, the prosecutor so tainted the proceedings that the evidence should have been suppressed and the resulting indictment dismissed.

STATEMENT OF FACTS

Petitioner Educational Development Network Corporation ("EDN") is owned by petitioner Gerald Kress ("Kress"). EDN entered into a contract with the United States Department of Defense to provide a career planning program to assist the Army National Guard in its

recruitment efforts. On July 13, 1988, EDN and Kress were indicted for fraud and gratuities in connection with the contract.

As the court of appeals found, the investigation began in the summer of 1986, when a former EDN employee and certain government officials contacted the Office of the United States Attorney for the Eastern District of Pennsylvania. The employee alleged that there were improprieties in EDN's provision of cost and pricing data to DOD. The meetings that followed included attorneys from the criminal and civil divisions of the United States Attorney's office, as well as William Weinstein, a special agent of the DOD Inspector General, Defense Criminal Investigative Service. On or about September 27, 1986, an Assistant United States Attorney from the Criminal Division notified counsel for EDN of the pending investigation, and on October 2, 1986, the United States Attorney opened a grand jury file on petitioners, filing an *ex parte* Rule 6(e) notice of disclosure with the United States District Court for the Eastern District of Pennsylvania.

Although the government had begun to use the grand jury process, no grand jury subpoena was issued. Instead, on October 13, 1986, DOD served an IG subpoena on EDN. Before the date the documents were due to be produced, DOD applied to a federal magistrate for a search warrant covering many of the same documents. DOD took possession of both the documents seized during the execution of the search warrant and the remaining material produced by EDN in response to the subpoena. DOD then made the documents available to the criminal and civil branches of the Department of Justice and to the Army Criminal Investigation Division investigators who were also conducting an investigation of the matter.

In moving to suppress the evidence and dismiss the indictment, petitioners argued that the IG subpoenas were issued after the matter had been referred by the DOD Inspector General to the Department of Justice for

criminal prosecution and for the express purpose of avoiding Rule 6(e). The prosecutor responded:

> Well, Your Honor, I think that, in the brief, we have made clear that that purpose, which you just identified to use the I-G subpoenas so we can share it with the Department of Defense which we could not with the Grand Jury subpoena, there is nothing improper about that.
>
> Now, if you are asking me on the record, is that one of the reasons why I-G subpoenas were used, I believe, even though I'm not the one that ultimately sends out I-G subpoenas, I believe that yes, just as these two cases talk about how you want to share the information with the Department of Defense, I believe it was.

The district court found that "the government admitted the thrust of the factual allegations of the defendants." (Appendix at 21a).

On appeal, the court of appeals specifically found that the decision to issue the IG subpoena was not made by DOD alone, but that the Assistant United States Attorney was intimately involved:

> [A]t oral argument, [Government counsel] stated that the issuance of IG subpoenas was controlled by both the [DOJ] and the DOD and that they agreed to use them in lieu of a grand jury investigation so that the [DOJ] and the DOD could avoid the Rule 6(e) secrecy requirements and share the documents. (Appendix at 5a n.5).

The Third Circuit's factual findings were also premised upon the Chronological Activity Summary of an Army CID agent which was made part of the record. The agent's contemporaneous log revealed that it was the Assistant United States Attorney who orchestrated the parallel investigations and that the "investigators clearly sought to avoid using the grand jury because that information would have to be kept secret." (Appendix at 4a n.4).

DECISIONS BELOW

In the United States District Court for the Eastern District of Pennsylvania, petitioners first filed a motion to compel the production of discovery to aid in a suppression motion. Petitioners sought additional discovery and a hearing to show the existence of bad faith in the conduct of the parallel criminal, civil, and administrative investigations. On November 23, 1988, in an order attached in the Appendix at 16a, the district court denied the motion. Petitioners then filed a motion to suppress all documents taken pursuant to the IG subpoena and the search warrant, as well as a motion to dismiss the indictment. The district court denied the motions, and observed that the Inspector General is not barred from cooperating with a criminal investigation being conducted by the Department of Justice. (Appendix at 20a). The court stated that no grand jury abuse had occurred since there had been no disclosure of "matters occurring before the grand jury." (Appendix 22a).

On November 29, 1988, EDN and Kress entered conditional guilty pleas pursuant to Fed. R. Crim. P. 11(a)(2) reserving the right to seek appellate review of the district court's denial of the pre-trial motions. On appeal, petitioners relied on *United States v. LaSalle National Bank*, 437 U.S. 298 (1978) for the proposition that the DOD IG had no authority to issue a subpoena after the matter had been referred for criminal prosecution. They argued that the orchestration of the parallel criminal and civil investigations by the Assistant United States Attorney violated the defendants' rights to due process, and that therefore, suppression of the evidence and the dismissal of the indictment were the appropriate remedies. They further argued that the trial court erred in denying the motion for additional discovery to explore the prosecutor's motivation and the harm to Kress and EDN.

The court of appeals expressed strong reservations about the Assistant United States Attorney's use of the IG subpoenas and his direct involvement in the investigations being undertaken by the DOD and the Army:

> We do not minimize the concerns appellants express about [DOJ's] conceded express avoidance of the grand jury by choosing instead to use the Inspector General's civil investigative powers in the investigation of crime. . . .

(Appendix at 9a). However, the court distinguished *LaSalle* on the grounds that its holding applies only to subpoenas issued by the Internal Revenue Service ("IRS").

> [A]lthough dicta in *LaSalle* appear to support appellant's position, we do not believe they apply to this case because neither the DOD nor the Army was acting beyond its statutory requirements in conducting its investigation.

(Appendix at 12a).

REASONS FOR GRANTING THE WRIT

Petitioners submit that the Third Circuit erred in its conclusion that neither the DOD nor the Army was acting beyond its statutory powers in conducting its investigation. A review of the IG Act and its legislative history reveals that Congress did not intend that IG subpoenas would be issued under the direction of an Assistant United States Attorney after the matter had been referred to the Department of Justice for criminal prosecution or that such a procedure could intentionally be invoked to avoid the strictures of Fed. R. Crim. P. 6(e). Under such circumstances, the court of appeals should have applied the *LaSalle* holding to the undisputed facts before it.

THE *LASALLE* DECISION

In *LaSalle*, the Court held that an IRS summons may not be used to gather evidence after an investigation has

been referred to the Department of Justice for criminal prosecution. That case arose out of a petition to enforce an IRS summons which was issued *prior* to the referral of the case for criminal prosecution. The district court had found the summons to be unenforceable, since the agent involved was gathering information for the specific purpose of building a criminal case. The Court held that the agency was permitted to issue a summons only in the good faith pursuit of a congressionally authorized purpose. Since, notwithstanding the intentions of the particular agent, the recipient of that subpoena could not disprove the existence of a valid civil purpose on behalf of the agency, the subpoena was enforceable. Significantly for purposes of this case, the Court held that IRS subpoenas could *not* be used as a substitute for grand jury process in a criminal case.

The IRS is barred by statute from issuing a summons after a criminal referral has been made. In resolving the question posed in *LaSalle*, this Court probed the congressional intent behind this limitation to determine whether the prohibition should be extended to the early stages of an investigation, when the civil and criminal aspects are intertwined. The Court noted that the limitation upon the use of the summons once criminal prosecutors have become involved safeguards important policy interests:

> Nothing in § 7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation.

437 U.S. at 312.

APPLICATION OF *LASALLE* TO THIS CASE

In contravention of the Court's observations in *LaSalle*, the procedure followed in this case served both "to

broaden the Justice Department's right of criminal litigation discovery" and "to infringe on the role of the grand jury as a principal tool of criminal accusation." *Id.* Petitioners submit that a writ of certiorari should be granted because the court of appeals erred in concluding that the lesson of *LaSalle* did not apply; nothing in the IG Act or its legislative history empowered DOJ to act in concert with an Inspector General to expand the subpoena power of the prosecutors and evade the grand jury. Indeed, the legislative history indicates that Congress specifically intended that the Department of Justice would retain its traditional responsibility for the prosecution of criminal cases and that Inspectors General would be prohibited from lending their subpoena power to DOJ or any other agency not similarly endowed.

THE IG ACT AND LEGISLATIVE HISTORY

Congress accorded the Inspector General the authority to subpoena books and records in § 6(a)(4) of the IG Act. The Department of Justice advised lawmakers of its concern arising out of this grant of subpoena power:

> Such power would replace the traditional functions of the grand jury without the attendant safeguards.

Legislation to Establish Offices of the Inspector General: Hearings on HR 8588 Before the Subcomm. on Governmental Efficiency and the District of Columbia of the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 27, 38 (1978) ("*Senate Hearings*").

In response to this concern, Congress provided in Section 4(d) of the IG Act that:

> In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.

Although the statute is silent on the relationship between this reporting requirement and the Inspector General's subpoena power, the legislative history of the Act reveals that Congress was particularly vigilant that expanding the powers of the IGs should not operate to invest them with prosecutorial functions.

Section 3(a)(3)(B) of the proposed legislation considered by both the House and the Senate provided that:

> It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established . . . to recommend policies for, and to conduct, supervise, or coordinate relationships between such establishment and other Federal agencies, State and local governmental agencies, and non-governmental entities with respect to . . . the identification and prosecution of participants in . . . fraud or abuse.

In light of this provision, the Department of Housing and Urban Development, in its letter to the House subcommittee, noted:

> [A]ll investigations and prosecutions of crimes against the United States are the responsibility of the Department of Justice (28 U.S.C.A. § 533), and specifically all agencies must expeditiously report to [the Department of Justice] any information relating to a violation of Title 18 (Crimes) involving a government employee (28 U.S.C.A. § 535).

Establishment of Offices of Inspector General, Hearings on H.R. 2819 Before the Subcomm. on Intergovernmental Relations and Human Resources of the House Comm. on Governmental Operations, 95th Cong., 1st Sess., Aug. 5, 1977 at 522 ("*House Hearings*"). The committee, in its report, recognized the responsibility of the Department of Justice for all prosecutions of fraud and abuse, stating:

> The Inspector General would not conduct prosecutions or decide whether prosecutions should or should not

> be conducted but would undoubtedly provide assistance to officials charged with responsibility for prosecuting such cases.

H.R. Rep. No. 95-584, 95th Cong., 1st Sess. 13 (1977) ("House Report").

In the subsequent Senate Hearings, the Office of Management and Budget submitted a letter to the subcommittee outlining, among other matters, its position on this section of the IG Act:

> We do not believe that the Inspector General should have a statutory *prosecution* role, particularly when such matters are to be referred to the Attorney General for criminal investigation and prosecution pursuant to Section 3(d). Any continuing assistance by the Inspector General to the Attorney General should be determined on a case-by-case basis between the Inspector General, the head of the agency, and the Justice Department. We, therefore, recommend that the "prosecution" role be deleted from Section 3(a)(3)(B) to avoid confusion with the prosecutorial responsibilities of the Attorney General.

Senate Hearings, supra, at 12 (emphasis added).

Although Congress left the provision in the Act, it is clear that Congress understood the Inspector General's role in prosecutions to be a limited one. Section 4(a)(4) of the Act permits the Inspector General "to *coordinate relationships*" between his office and other agencies "with respect to . . . the identification and prosecution of participants" in fraud (emphasis added). These duties fulfill the purposes of the Act "to promote economy, efficiency, and effectiveness" and "to prevent and detect fraud and abuse" in government programs, § 2(2), but they do not permit IGs to serve as the agents for a criminal prosecution and gather evidence at the behest of a Justice Department official who has no subpoena power himself.

The reporting requirement embodied in the statute reflects the fact that Congress was impressed by the testimony reiterating that it was the Attorney General who was charged with the responsibility for criminal enforcement. Justice Department officials testified at the hearings and explained that the Inspector General's role would be to detect fraud in the first instance or to provide helpful information about agency programs and procedures as members of an investigation team. The Acting Assistant Attorney General for the Criminal Division testified:

> It is important to emphasize . . . the role of the agencies in investigations. . . . The problem in this area lies in the initial detection of the fraud and abuse. An Inspector General can fill this detection vacuum. Accordingly, *we do not view the Offices of Inspector General as being a substitute for the FBI in investigating criminal fraud matters, but rather as an organization which will complement the efforts of the FBI in criminal enforcement.*

Senate Hearings, supra, at 26 (emphasis added). In addition, the Department of Justice, in responding to a questionnaire posed by the subcommittee, stated:

> We rely a great deal on internal investigators and auditors to initially uncover fraud and corruption in our federal programs. In addition to identifying areas which warrant criminal investigation and prosecution, we are more frequently discovering that agency auditors and/or investigators add a new dimension to our investigative teams working on complex government frauds. Not only are they intimately familiar with the internal organization of their agency, but they also understand the structure of the programs and the procedures utilized in connection with the implementation of the program.

House Hearings, supra, at 705.

While it was contemplated that the IGs could assist the prosecutor, neither the statute nor the legislative

record provides for the issuance of IG subpoenas at the request of the prosecutors once a decision to bring a criminal prosecution has been made.

The court of appeals found as a matter of fact that DOJ had participated in the decision to issue the subpoena, but its holding addressed only whether DOD exceeded its statutory authority. The court ignored a critical element of the case, *i.e.*, that the prosecutor had no legal basis to order the issuance of the subpoena. Furthermore, the IG exceeded his statutory authority as well. Congress did not intend to permit the Inspector General to use his subpoena power to gather documents for a government official who lacked that authority:

> The committee intends, of course, that the Inspector General will use this subpoena power in the performance of his statutory functions. The use of subpoena power to obtain information for another agency component which does not have such power would clearly be improper.

S. Rep. No. 95-1071, 95th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News 2676, 2709.

CONCLUSION

The legislative history of the IG Act reveals that Congress was warned that a grant of subpoena power to the Inspector General might undermine the protections provided by the grand jury. Congress was also reminded that it was not the IG's function to usurp the role of the FBI or Department of Justice prosecutors, and Congress expressly provided in the Act that evidence of criminal wrongdoing should be reported to the Attorney General as soon as possible. Congress also stated its understanding that the Inspector General would not lend his subpoena power to an agency that lacked such authority. In light of these intentions, the court of appeals should have determined that the subpoena in this case was not issued in furtherance of any congressionally authorized purpose.

While Congress saw the need for Inspectors General to have the power to subpoena documents to further their civil functions and to detect fraud which had not yet been brought to the attention of criminal prosecutors, Congress did not intend to usurp the role of the grand jury once a criminal referral had been made.

For these reasons, this Court should grant this Petition for a Writ of Certiorari to the United States Court of Appeals.

Respectfully submitted,

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January 16, 1990

APPENDICES

APPENDIX A

Filed: September 7, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-1239 & 89-1240

UNITED STATES OF AMERICA,
Appellee

v.

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION,
Appellant at No. 89-1239

(D.C. Criminal Action No. 88-00271-01)

UNITED STATES OF AMERICA,
Appellee

v.

GERALD KRESS,
Appellant at No. 89-1240

(D.C. Criminal Action No. 88-00271-02)

Appeal from the United States District Court
for the Eastern District of Pennsylvania

Argued: July 25, 1989

BEFORE: GIBBONS, *Chief Judge*,
HUTCHINSON, *Circuit Judge*,
and WOLIN, *District Judge**

(Opinion Filed September 7, 1989)

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

I.

The issue in this case is whether the criminal division of the United States Attorney's Office's (USAO's) use of subpoenas that the Department of Defense Inspector General issued after the USAO's criminal division filed a

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* Hon. Alfred M. Wolin, District Judge of the United States District Court for the District of New Jersey, sitting by designation.

Federal Rule of Criminal Procedure 6(e) Notice of Disclosure violated the appellants' Fifth Amendment rights to due process and indictment only by action of a grand jury. We conclude that it did not and will affirm the district court's orders of judgment and conviction.

II.

Educational Development Network Corporation (EDN) and its owner, Gerald Kress (Kress), entered into a non-competitive contract with the United States Department of Defense (DOD) to provide an educational and employment training program to the Army National Guard Bureau (Guard). Lieutenant Colonel Robert Allen Baxter (Baxter),[1] chief of the Guard's Recruitment and Retention Center, was the Contract Officer Representative for the EDN contract. Baxter had significant contact with EDN and Kress and oversaw and approved the work called for by EDN's contract. In the summer of 1986, a former EDN employee and several government officials contacted the USAO about possible wrongdoing in connection with the cost and pricing information EDN was providing to the DOD.[2] The meetings that followed were attended by representatives from the civil and criminal divisons of the USAO and William Weinstein (Weinstein), a special agent of the DOD Inspector General, Defense Criminal Investigative Service. EDN was informed of an impending investigation by Assistant United States Attorney Leon J. Dobkin (Dobkin) of the USAO criminal division around September 22, 1986.

On October 2, 1986, the USAO's criminal division opened a grand jury file on EDN, Kress and Baxter

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[1] A jury found Baxter guilty of receiving an illegal gratuity. He has separately appealed his conviction, at No. 89-1214. We affirm his conviction in a published opinion issued today.

[2] The indictment alleged that EDN and Kress became 50% owners in Baxter's family race car operation. Performance Formula, Inc., and supplied approximately $61,400 in funding to it.

and filed an *ex parte* Rule 6(e) Notice of Disclosure with the United States District Court for the Eastern District of Pennsylvania.[3] It listed Dobkin as the Assistant United States Attorney in charge of the file. The grand jury docket sheet shows no further activity until January 13, 1988.

On October 3, 1986, Weinstein served an Inspector General (IG) subpoena on EDN. On October 30, 1986, before the documents were due, a federal magistrate issued a search warrant to the DOD covering many of the same documents.[4] The DOD took possession of documents during the search and later when EDN turned over the remaining subpcenaed documents. The documents were made available to the civil and criminal divisions of the USAO, the DOD and the Army Criminal Investigation Division (Army), which was investigating Baxter. The government candidly admits on appeal that the USAO and DOD agreed to conduct a joint investigation and to use DOD IG subpoenas so that the agencies could share the evidence obtained.[5]

---

[3] As we wrote in *In re Grand Jury Proceedings*, 309 F.2d 440. 443 (3d Cir. 1962): "The proceedings before a grand jury are protected against disclosure by the common law policy of secrecy. This policy is continued in Rule 6(e) . . . ." By filing a notice of disclosure with the court, the USAO informed the court that it intended to disclose grand jury materials to the government personnel set forth in the notice, so that they could assist in the prosecution.

[4] Weinstein stated by affidavit that the search warrant was issued "due to alleged misconduct in EDN's production in response to the I.G. subpoenas." Appendix (App.) at 55a.

[5] The record contains a Chronological Activity Summary of agent Klug (Klug), who was in charge of the Army investigation. App. at 120a-225a. Some of Klug's entries indicate that Dobkin agreed to help the Army get subpoenas for Baxter's tax returns. *Id.* at 148a, 156a. The IRS was also interested in the Army's procurement of an *ex parte* order gaining access to EDN's and Baxter's IRS records. *Id.* at 196a. There is also other evidence that the investigators clearly sought to avoid using the grand jury

On January 6, 1988, the DOD was told to complete all communications with the civil division of the USAO by January 13, 1988, when a "new phase" of the criminal investigation was to begin. App. at 56a. The information collected during the joint investigation was then presented to the grand jury. It returned an indictment on July 13, 1988. The indictment alleged that EDN and Kress submitted inflated estimates of EDN's costs on its contract to the DOD and that Baxter received illegal gratuities in return for approving them.

On October 14, 1988, the defendants filed a motion to compel discovery in aid of a suppression motion, alleging that the USAO acted in "bad faith" when it used IG subpoenas and a search warrant to gather evidence during a joint grand jury/criminal/civil/administrative/military investigation. The motion sought an order compelling additional discovery and requested a hearing to determine whether the USAO had in bad faith violated defendants' rights under the Fifth Amendment to due process and indictment only by action of a grand jury.[6]

---

because that information would have to be kept secret. An investigator wrote:

> November 24, 1987:
>
> I am not opposed to combining our invest[igation] with that of [DOD], but if we do not do that we must go for the corporate check register with DODIG subpoenas . . . *not* Grand Jury Subpoenas. Don't lose sight of Rule 6(e) requirements/problems.

Id. at 206a. Nevertheless, Dobkin later decided to use grand jury subpoenas to gather this information. *Id.* at 209a.

In his affidavit Weinstein indicated that he was the person deciding whether to issue IG subpoenas. *Id.* at 54a-55a. However, at oral argument the USAO stated that the issuance of IG subpoenas was controlled by both the USAO and the DOD and that they agreed to use them in lieu of a grand jury investigation so that the USAO and the DOD could avoid the Rule 6(e) secrecy requirements and share the documents.

[6] The Fifth Amendment states, in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime,

Defendants based their requests on *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978), which held *inter alia* that the Internal Revenue Service (IRS) must use its summons authority in good faith when pursuing a civil/criminal investigation. After a hearing, the district court denied the motion, holding that *LaSalle* applied only to IRS investigations and not to the IG subpoenas.

On November 28, 1988, EDN, Kress and Baxter filed a motion to suppress and dismiss the indictment, based on the same argument. On November 29, 1988, after another hearing, the district court denied the motion. The court found:

> The defendants have failed to make out a prima facie showing of grand jury abuse. It is well-settled in this Circuit that grand jury proceedings are generally accorded a presumption of regularity and that a request for inspection of grand jury materials must be bottomed on more than an allegation that improper conduct has occurred and that discovery will verify this belief. Furthermore, although the defendants presented no evidence of improper disclosure of matters occurring before the grand jury, Special Agent Weinstein's affidavit demonstrates that no evidence was presented to the grand jury until January 1988, a date subsequent to the period during which defendants suggest that grand jury material may have been disclosed to the Department of Defense. Since the grand jury had not heard any evidence, there was nothing to disclose prior to January 1988 that would violate Rule 6(e).

App. at 279a.

On November 29, 1988, the date trial was to start, EDN and Kress pleaded guilty. In the plea agreement

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unless on a presentment of indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

the defendants reserved the right to raise these issues on appeal from their convictions. They were sentenced on March 14, 1989 and filed this appeal on March 22, 1989.

III.

We have appellate jurisdiction over the district court's orders of judgment and conviction pursuant to 28 U.S.C.A. § 1291 (West Supp. 1989). Since resolution of the issues EDN and Kress raise concerning the district court's orders involves questions of law, we exercise plenary review.

IV.

EDN and Kress contend that the district court erred in denying their motion for suppression of all documents obtained by either the IG subpoena or the search warrant.[7] They base their contention on the argument that once the USAO's criminal division impaneled the grand jury and filed a notice of disclosure under Rule 6(e), the agency was not free to ignore the grand jury subpoena process and its secrecy requirements in favor of the IG subpoena process. Appellants say this raises serious issues about the constitutional role of the grand jury in restricting the government's inquisitory power over persons suspected of crime.

In presenting their argument appellants place great reliance on Federal Rule of Criminal Procedure 6(e)(2). However, we do not believe Rule 6(e) bars the USAO's criminal division from participating in other

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[7] In their reply brief appellants concede that there is no longer any need for discovery and a *Genser II/Serubo* hearing to determine whether the government acted in bad faith, given the USAO's acknowledgement of its role in the investigation and its control over issuance of the IG subpoenas. *See United States v. Genser*, 595 F.2d 146, 152 (3d Cir.) (*Genser II*), *cert. denied*, 444 U.S. 928 (1979); *United States v. Serubo*, 604 F.2d 807, 812 (3d Cir. 1979).

agencies' investigations before it actually begins presentation of evidence to the grand jury, and appellants refer us to no statutory or case law to the contrary. Rule 6(e)(2) provides in general that matters occurring before the grand jury may not be disclosed. Disclosure of such matters may only be made under the narrow exceptions listed in Rule 6(e)(3). The grand jury material may not be used "for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Rule 6(e)(3)(B). "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal. . . ." Rule 6(e)(6). United States Attorneys do not have the power to subpoena evidence. They must ask the grand jury to do that. However, grand jury subpoenas often are issued as a matter of course. *See In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973) (*Schofield I*) (grand jury subpoenas are "instrumentalities of the United States Attorney's office").

The rationales for grand jury secrecy are:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954); *see Douglas Oil Co. v. Petrol Stops Northwest*,

441 U.S. 211, 219 n.10 (1979); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 n.36 (D.C. Cir.) (en banc), *cert. denied*, 449 U.S. 993 (1980).

Once evidence is presented to the grand jury, the secrecy requirements of Rule 6(e) attach and prevent the government from sharing that information with persons other than those listed on the Notice of Disclosure. In this case the USAO did not present any evidence to the grand jury until January 13, 1988. Therefore, the secrecy requirements of Rule 6(e) did not attach until that time, and the USAO was free to share information uncovered in the joint investigation with the DOD and the Army. What occurred here is the USAO's disclosure of information obtained by DOD to the grand jury, not the USAO's disclosure of information obtained by the grand jury to the DOD. Therefore Rule 6(e), requiring grand jury secrecy, would seem to have no application. In any event, we fail to find any Rule 6(e) violation, since it is clear that after January 13, 1988 the USAO's criminal division ceased communicating with the DOD and the Army about the investigation.

Appellants also argue that the evidence must be suppressed because the USAO's criminal division obtained it pursuant to subpoenas and a search warrant it had caused to be issued in a bad faith attempt to do an end run around the constitutional requirement that indictments be secured only through a grand jury. EDN and Kress base this argument on the fact that the USAO was involved in the investigation and controlled, at least partially, the issuance of the IG subpoenas. We do not minimize the concerns appellants express about the USAO's criminal division's conceded express avoidance of the grand jury by choosing instead to use the Inspector General's civil investigative powers in the investigation of crime, but they fail to direct us to any statutory, regulatory, or case law that prevents the USAO from doing so.

Appellants rely on dicta in *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978), in support of their position that the use of civil investigative powers is improper when there is an ongoing criminal investigation. *LaSalle* involved an IRS agent who was using summonses to obtain evidence for a criminal investigation. The Supreme Court held that although an IRS agent has no statutory power to conduct a criminal investigation, it was almost impossible to conduct an IRS investigation without both civil and criminal implications. The Court concluded, based on its prior decision in *Donaldson v. United States*, 400 U.S. 517, 536 (1971), that so long as the summonses were issued in good faith before the agent referred the case to the Justice Department for prosecution, they were enforceable. To establish bad faith, the complainant had to show that the IRS issued the summons for a purpose other than those authorized by Congress in 26 U.S.C.A. § 7602 (West 1989).

Appellants rely on the following language from *LaSalle*:

> A referral to the Justice Department permits criminal litigation to proceed. The IRS cannot try its own prosecutions. Such authority is reserved to the Department of Justice and, more particularly, to the United States Attorneys. 28 U.S.C. § 547(1). *Nothing in § 7602 [of the Internal Revenue Code] or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation. The likelihood that discovery would be broadened or the role of the grand jury infringed is substantial if post-referral use of the summons authority were permitted.* For example, the IRS, upon referral, loses its ability to compromise both the criminal and the civil aspects of a fraud case. 26 U.S.C. § 7122(a). After the

> referral, the authority to settle rests with the Department of Justice. Interagency cooperation on the calculation of the civil liability is then to be expected and probably encourages efficient settlement of the dispute. But such cooperation, when combined with the inherently intertwined nature of the criminal and civil elements of the case, suggests that it is unrealistic to attempt to build a partial information barrier between the two branches of the executive. Effective use of information to determine civil liability would inevitably result in criminal discovery. The prophylactic restraint on the use of the summons effectively safeguards the two policy interest while encouraging maximum interagency cooperation.

LaSalle, 437 U.S. at 312-13 (citations omitted) (emphasis added).

Appellants' reliance on *LaSalle* is misplaced. *LaSalle* was decided under § 7602 of the Internal Revenue Code and is relevant only in criminal cases involving the IRS. In *Donovan v. Spadea*, 757 F.2d 74, 77 (3d Cir. 1985), the appellant asked us to "recognize a general, albeit nonconstitutional, rule that administrative subpoenas issued to develop criminal cases are unenforceable." We noted that the cases relied on by appellant, *LaSalle*, *Donaldson* and *United States v. Powell*, 379 U.S. 48, 57-58 (1964), "do not establish any such general rule." *Donovan*, 757 F.2d at 77. We recognized that *LaSalle*, *Donaldson*, and *Powell* "do no more than establish standards for determining when an administrative agency that has only civil enforcement powers is engaged in an investigation aimed at developing a criminal case, and is hence acting beyond its statutory authority." *Id.*[8] Therefore,

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[8] The Third Circuit cases relied on by appellants are also IRS cases. *See United States v. Genser*, 595 F.2d 146 (3d Cir.) (*Genser II*), *cert. denied*, 444 U.S. 928 (1979); *United States v. Genser*, 602 F.2d 69 (3d Cir.) (per curiam) (*Genser III*), *cert. denied*, 444 U.S. 928 (1979); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979).

although dicta in *LaSalle* appear to support appellants' position, we do not believe they apply to this case because neither the DOD nor the Army was acting beyond its statutory requirements in conducting its investigation.

In denying appellants' request for a hearing and suppression of the evidence, the district court relied on *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142 (D.C. Cir. 1987). In that case, the Antitrust Division of the Justice Department was investigating the moving and storage industry. In September 1985, the Department of Defense Inspector General began his own investigation of DOD contractors. The Antitrust Division and the FBI contacted the Inspector General and suggested a "cooperative investigation." *Id.* at 1144. The Inspector General then issued subpoenas to the appellants, who refused to comply. They argued that the Inspector General had "rubber stamped" the subpoenas and that the real investigator was the Justice Department, which should have gotten its subpoenas from a grand jury. The Inspector General's subpoenas, they argued, were therefore issued for an improper purpose. The district court declined to pass on the scope of the Inspector General's independence and ordered compliance. On appeal, the United States Court of Appeals for the District of Columbia Circuit made clear that the Justice Department was free to guide or influence the Inspector General and his subpoenas, "[s]o long as the Inspector General's subpoenas seek information relevant to the discharge of his duties." *Id.* at 1146. *See also United States States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 171 (3d Cir. 1986) ("we believe Congress intended that the courts accept the Inspector General's determination of what information is 'necessary to carry out the functions assigned [to him]' so long as the information is relevant to an Inspector General function."). The court in *Aero Mayflower* found nothing wrong with the Justice Department's use of IG subpoenas rather than grand jury subpoenas, since grand jury matters could not be shared

with the DOD. It said that "no body of law, whether statutory or regulatory, explicitly or implicitly restricts the Inspector General's ability to cooperate with divisions of the Justice Department exercising criminal prosecutorial authority." *Aero Mayflower*, 831 F.2d at 1146.[9] Likewise, there are no such restrictions in this case.

Appellants argue that

> [t]he question in *Aero Mayflower* should not have been did the interpretation of the Statute restrict the Justice Department's power to use the grand jury to obtain the same documents. It should have been, as in *LaSalle*, was there any Congressional intent to justify an interpretation or application which would expand the [Justice Department's] criminal discovery rights or infringe (even potentially by allowing [the Justice Department] to have an alternative [to]) the role of the grand jury.

Brief for Appellants at 27. Whatever our reservations regarding the USAO's use of IG subpoenas and its degree of involvement in the DOD and Army investigation, appellants' arguments are more properly addressed to the Congress than to a court.[10]

Although the USAO's criminal division is traditionally restricted to conducting investigations before a grand

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[9] The court found *LaSalle* "totally inapposite." *Aero Mayflower* 831 F.2d at 1146.

[10] A review of the relevant legislative history indicates that Congress expected cooperation between the IG and the Department of Justice in invetigating and prosecuting fraud cases. *See* S. Rep. No. 1071, 95th Cong., 2d Sess. 6-7; *reprinted in* 1978 U.S. Code Cong. & Admin. News 2676, 2681-82.

While the DOD did not receive its own IG until 1983, *see* Department of Defense Authorization Act for 1983. Pub. L. No. 97-252, § 1117(a)(1), 96 Stat. 718, 750 (1982), nothing in the legislative history pertaining to the establishment of the post of DOD IG prohibits his cooperation with the Department of Justice.

jury, on this record we see no law or principle that would prevent it from presenting to the grand jury facts properly uncovered in the course of lawful investigations by another agency.[11]

Appellants also rely on dicta in *Dresser Industries* and *United States v. Merit Petroleum, Inc.*, 731 F.2d 901, 905 (Temp. Emer. Ct. App. 1984), in support of their argument that a party's rights could be compromised if he is confronted with simultaneous civil and criminal investigations. These cases do not apply. Both state that the party under investigation must show either that his rights will be prejudiced or that the investigating agency is acting in bad faith or using malicious tactics. Appellants fail to show how the criminal division's use of the IG subpoenas and search warrant prejudiced them. They also fail to show that the DOD or Army acted in bad faith or otherwise improperly in carrying out its investigations.

Finally, appellants allege that the USAO's criminal division "side-stepped" the procedural safeguards this Court established in *Schofield I*, 486 F.2d at 93, and in *In re Grand Jury Proceedings*, 507 F.2d 963, 964-65 (3d Cir.) (*Schofield II*), *cert. denied*, 421 U.S. 1015 (1975). Those cases require that a party seeking enforcement of a subpoena must show that (1) the agency has the power to request the evidence, (2) that each requested item is relevant to the investigation, and (3) that the evidence is sought in good faith. Here, the IG subpoenas were properly issued in the course of a DOD investigation. There is no allegation that the evidence was not relevant, that the DOD had no power to issue the subpoenas, or, as noted, of bad faith on the part of the DOD. Appellants' argument that the USAO's participation affected any one of the three prongs of the *Schofield* test is therefore without merit.

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[11] There is nothing in this record to show that the agency investigation itself was improper or used as a subterfuge by the USAO once it was unable to obtain the subpoenas from a grand jury.

V.

We conclude that the district court did not commit error when it denied appellants' motion to suppress evidence obtained by the use of IG subpoenas and a search warrant. We will therefore affirm the judgment and conviction orders of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 88-00271-01
-02
-03

UNITED STATES OF AMERICA

v.

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION, GERALD KRESS, ROBERT ALLEN BAXTER

ORDER

[Filed Nov. 23, 1988]

AND NOW, this 23rd day of November, 1988, upon consideration of defendants' joint motion to compel discovery to aid in a suppression motion, the government's response thereto and the oral argument held on November 21, 1988; the defendants seeking to suppress evidence gathered pursuant to a subpoena and a search warrant obtained by the Department of Defense Inspector General ("DODIG") on the grounds that the Department of Justice was already pursuing a criminal investigation, including the use of a grand jury; the defendants claiming on the authority of *United States v. LaSalle National Bank*, 437 U.S. 298, 98 S.Ct. 2357 (1978) an entitlement to discovery to determine whether the evidence so obtained should be suppressed on the grounds that the subpoena and search warrant were not used in good faith;

the Court having determined in accordance with *United States v. Aero Mayflower Transit Co., Inc.*, 831 F.2d 1143 (D.C. Cir. 1987) and *SEC v. Dresser Industries, Inc.*, 628 F.2d 1369 (D.C.Cir. 1980) (en banc) that *LaSalle* applies solely to the Internal Revenue Code statutory scheme under which Internal Revenue Service civil investigative authority ceases for all practical purposes upon referral of a case for criminal prosecution; the investigative powers of the DODIG not being so limited by the Defense Authorization Act, 1983, Pub.L. 97-252, 96 Stat. 718, 750 (1982), as it amended the Inspector General Act of 1978, 5 U.S.C.App. 31-12 (1982 & Supps. I-III), in that the DODIG is not barred from proceeding with a criminal investigation together with the Department of Justice;

IT IS ORDERED: defendants' joint motion to compel discovery to aid in a suppression motion is DENIED.

/s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

11-25-88 Copy To:
L. Dobkin, Esq., AUSA
G.T. Magarity, Esq.
W.J. Winning, Esq.
Speedy Trial Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal Nos. 88-00271-01
-02
-03

UNITED STATES OF AMERICA

v.

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION,
GERALD KRESS, ROBERT ALLEN BAXTER

ORDER

AND NOW, this 29th day of November, 1988, upon consideration of the Motion of All Defendants for Suppression of All Documents taken Pursuant to the October 1, 1986 Department of Defense Subpoena and the October 31, 1986 Search Warrant and Motion to Dismiss the Indictment, for the reasons set forth in this Court's Memorandum of November 29, 1988,

IT IS ORDERED: Defendants' motion is DENIED.

/s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

11/30/88
G. L. Dobkin, AUSA
G. Magarity, Esq.
W. Winning, Esq.
Opinion Clerk (4xc.)
Legal
S.T.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal Nos. 88-00271-01
-02
-03

UNITED STATES OF AMERICA

v.

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION, GERALD KRESS, ROBERT ALLEN BAXTER

MEMORANDUM

BRODERICK, J. November 29, 1988

On October 14, 1988 defendants filed a motion to compel the production of discovery to aid in a suppression motion. Defendants' motion contended that the government improperly conducted a combined grand jury/Department of Defense criminal investigation of defendants and violated Fed.R.Crim.P. 6(e) in that the Department of Defense Inspector General subpoenas were used in "bad faith" pursuant to *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). Oral argument was held on November 21, 1988 at which time the defendants pointed out that they desired to suppress evidence gathered pursuant to a subpoena and a search warrant obtained by the Department of Defense Inspector General on the ground that the Department of Justice was at that time in the process of pursuing a criminal investigation of the

case including the use of a grand jury. It was the contention of the defendants that the evidence obtained pursuant to the subpoena and the search warrant obtained by the Inspector General should be suppressed on the ground that the subpoena and the search warrant were used in bad faith.

In an Order dated November 22, 1988, this Court denied the defendants' joint motion to compel discovery. The Court relied on *United States v. Aero Mayflower Transit Co., Inc.*, 831 F.2d 1143 (D.C. Cir. 1987) and *SEC v. Dresser Industries, Inc.*, 628 F.2d 1369 (D.C. Cir. 1980), which cases hold that *United States v. LaSalle National Bank* applies solely to the Internal Revenue Code statutory scheme under which Internal Revenue Service civil investigative authority ceases for all practical purposes upon referral of a case for criminal prosecution. *Dresser* and *Aero Mayflower* also hold that the investigative powers of the Department of Defense Inspector General are not limited by the Defense Authorization Act, 1983, Pub.L. 97-252, 96 Stat. 718, 750 (1982), as it amended the Inspector General Act of 1978, 5 U.S.C. App. § 1-12 (1982 & Supps. I-III) in that the Inspector General is not barred from proceeding with an investigation in connection and in cooperation with a criminal investigation being conducted by the Department of Justice.

On November 28, 1988, the defendants filed a motion entitled "Motion of All Defendants for Suppression of All Documents Taken Pursuant to the October 1, 1986 Department of Defense Subpoena and the October 31, 1986 Search Warrant and Motion to Dismiss the Indictment." Said motion to suppress relies, as did the defendants' motion for discovery, upon the allegation that the government improperly conducted a combined grand jury/Department of Defense criminal investigation of defendants and violated Fed.R.Crim.P. 6(e) in that the subpoenas obtained by the Department of Defense In-

spector General were obtained after the matter was referred for criminal investigation to the Department of Justice by the Department of Defense, Office of Inspector General.

A hearing was held on November 29, 1988 at which time the government admitted the thrust of the factual allegations of the defendants as set forth in the defendants' motion. The government in its response presented to the Court an affidavit of William Weinstein, a Special Agent with the United States Department of Defense, Office of Inspector General, in which he acknowledges that he permitted the Civil Division of the United States Attorney's Office access to the documents which he had obtained pursuant to the subpoena of October 1, 1986 and the search warrant of October 31, 1986. The affidavit also states that on January 6, 1988 Special Agent Weinstein received a memorandum from Assistant United States Attorney Lee Dobkin directing him to complete his communications with the Civil Division by January 13, 1988 because of a new phase of the criminal investigation, and that as of January 13, 1988, no matters relating to the investigation had occurred before the grand jury. The affidavit of Special Agent Weinstein also stated that he has never divulged matters occurring before the grand jury to anyone other than Special Agent Maurice Welsh of the Federal Bureau of Investigation and United States Army C.I.D. Agent Donald Albright, each of whom is on the 6(e) disclosure list.

Both *Aero Mayflower* and *Dresser Industries* reject the contentions upon which the defendants rely. These two cases specifically distinguish *United States v. LaSalle.* As is stated by the Third Circuit in *United States v. Westinghouse Electric Corp.*, 788 F.2d 164, 169 (1986),

> So long as the Inspector General's subpoenas seek information relevant to the discharge of his duties, the exact degree of Justice Department guidance or influence seems manifestly immaterial.

The defendants have failed to make out a prima facie showing of grand jury abuse. It is well-settled in this Circuit that grand jury proceedings are generally accorded a presumption of regularity and that a request for inspection of grand jury materials must be bottomed on more than an allegation that improper conduct has occurred and that discovery will verify this belief. Furthermore, although the defendants presented no evidence of improper disclosure of matters occurring before the grand jury, Special Agent Weinstein's affidavit demonstrates that no evidence was presented to the grand jury until January 1988, a date subsequent to the period during which defendants suggest that grand jury material may have been disclosed to the Department of Defense. Since the grand jury had not heard any evidence, there was nothing to disclose prior to January 1988 that would violate Rule 6(e).

Therefore, on the basis of the presentation to this Court both at the oral argument held on November 21, 1988 and at a hearing held on November 29, 1988, this Court has determined that there is no basis at this time to require the government to disclose its investigatory files or any information presented to the grand jury. The defendants' motion to suppress and to dismiss the complaint will be denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-1239 & 89-1240

UNITED STATES OF AMERICA,
Appellee

v.

EDUCATIONAL DEVELOPMENT NETWORK CORPORATION,
Appellant at No. 89-1239

(D.C. Criminal Action No. 88-00271-01)

UNITED STATES OF AMERICA,
Appellee

v.

GERALD KRESS,
Appellant at No. 89-1240

(D.C. Criminal Action No. 88-00271-02)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, *Circuit Judges*, and WOLIN, *District Judge**

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* Hon. Alfred M. Wolin, District Judge of the United States District Court for the District of New Jersey, as to Panel Rehearing only.

The petition for rehearing filed by appellants in the above captioned matters having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ William D. Hutchinson
Circuit Judge

Dated: Oct. 17, 1989

APPENDIX E

APPENDIX 3

INSPECTOR GENERAL ACT OF 1978

Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended Pub.L. 96-88, Title V, § 508(n), Oct. 17, 1979, 93 Stat. 694; Pub.L. 97-113, Title VII, § 705, Dec. 29, 1981, 95 Stat. 1544; Pub.L. 97-252, Title XI, § 1117(a)-(c), Sept. 8, 1982, 96 Stat. 75-752; Pub.L. 99-93, Title I, § 150(a), Aug. 16, 1985, 99 Stat. 427; Pub.L. 99-399, Title IV, § 412(a), Aug. 27, 1986, 100 Stat. 867; Pub. L. 100-504, Title I, §§ 102(a)-(d), (f), (g), 104(a), 105, 106(c), (d), 107, 109, 110, Oct. 18, 1988, 102 Stat. 2515-2518, 2520-2522, 2525, 2527-2529; Pub.L. 100-527, § 13(h)(2), (3), Oct. 25, 1988, 102 Stat. 2643.

§ 1. Short title

That this Act be cited as the "Inspector General Act of 1978".

§ 2. Purpose and establishment of Offices of Inspector General; departments and agencies involved

In order to create independent and objective units—

(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2);

(2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to

the administration of such programs and operations and the necessity for and progress of corrective action;

there is hereby established in each of such establishments an office of Inspector General.

§ 3. Appointment of Inspector General; supervision; removal; political activities; appointment of Assistant Inspector General for Auditing and Assistant Inspector General for Investigations

(a) There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpena during the course of any audit or investigation.

(b) An Inspector General may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress.

(c) For the purposes of section 7324 of Title 5, United States Code, no Inspector General shall be considered to be an employee who determines policies to be pursued by the United States in the nationwide administration of Federal laws.

(d) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service—

(1) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment, and

(2) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations.

§ 4. Duties and responsibilities; report of criminal violations to Attorney General

(a) It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established—

(1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment;

(2) to review existing and proposed legislation and regulations relating to programs and operations of such establishment and to make recommendations in the semiannual reports required by section 5(a) concerning the impact of such legislation or regulations on the economy and efficiency in the administration of programs and operations administered or financed by such establishment or the prevention and detection of fraud and abuse in such programs and operations;

(3) to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administra-

tion of, or preventing and detecting fraud and abuse in, its programs and operations;

(4) to recommend policies for, and to conduct, supervise, or coordinate relationships between such establishment and other Federal agencies, State and local governmental agencies, and non-governmental entities with respect to (A) all matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered or financed by such establishment, or (B) the identification and prosecution of participants in such fraud or abuse; and

(5) to keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.

(b) (1) In carrying out the responsibilities specified in subsection (a) (1), each Inspector General shall—

(A) comply with standards established by the Comptroller General of the United States for audits of Federal establishments, organizations, programs, activities, and functions;

(B) establish guidelines for determining when it shall be appropriate to use non-Federal auditors; and

(C) take appropriate steps to assure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General as described in paragraph (1).

(2) For purposes of determining compliance with paragraph (1)(A) with respect to whether internal quality controls are in place and operating and whether established audit standards, policies, and procedures are being followed by Offices of Inspector General of establishments defined under section 11 (2), Offices of Inspector General of designated Federal entities defined under section 8E(a)(2), and any audit office established within a Federal entity defined under section 8E(a)(1), reviews shall be performed exclusively by an audit entity in the Federal Government, including the General Accounting Office or the Office of Inspector General of each establishment defined under section 11(2), or the Office of Inspector General of each designated Federal entity defined under section 8E(a)(2).

(c) In carrying out the duties and responsibilities established under this Act, each Inspector General shall give particular regard to the activities of the Comptroller General of the United States with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.

(As amended Pub.L. 100-504, Title I, § 109, Oct. 18, 1988, 102 Stat. 2529.)

§ 5. Semiannual reports; transmittal to Congress; availability to public; immediate report on serious or flagrant problems

(a) Each Inspector General shall, not later than April 30 and October 31 of each year, prepare semiannual reports summarizing the activities of the Office during the immediately preceding six-month periods ending March 31

and September 30. Such reports shall include, but need not be limited to—

(1) a description of significant problems, abuses, and deficiencies relating to the administration of programs and operations of such establishment disclosed by such activities during the reporting period;

(2) a description of the recommendations for corrective action made by the Office during the reporting period with respect to significant problems, abuses, or deficiencies identified pursuant to paragraph (1);

(3) an identification of each significant recommendation described in previous semiannual reports on which corrective action has not been completed;

(4) a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted;

(5) a summary of each report made to the head of the establishment under section 6(b)(2) during the reporting period; and

(6) a listing of each audit report completed by the Office during the reporting period.

(b) Semiannual reports of each Inspector General shall be furnished to the head of the establishment involved not later than April 30 and October 31 of each year and shall be transmitted by such head to the appropriate committees or subcommittees of the Congress within thirty days after receipt of the report, together with a report by the head of the establishment containing any comments such head deems appropriate.

(c) Within sixty days of the transmission of the semiannual reports of each Inspector General to the Congress, the head of each establishment shall make copies of such report available to the public upon request and at a rea-

sonable cost. Within 60 days after the transmission of the semiannual reports of each establishment head to the Congress, the head of each establishment shall make copies of such report available to the public upon request and at a reasonable cost.

(d) Each Inspector General shall report immediately to the head of the establishment involved whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate.

(e)(1) Nothing in this section shall be construed to authorize the public disclosure of information which is—

(A) specifically prohibited from disclosure by any other provision of law;

(B) specifically required by Executive order to be protected from disclosure in the interest of national defense of national security or in the conduct of foreign affairs; or

(C) a part of an ongoing criminal investigation.

(2) Notwithstanding paragraph (1)(C), any report under this section may be disclosed to the public in a form which includes information with respect to a part of an ongoing criminal investigation if such information has been included in a public record.

(3) Except to the extent and in the manner provided under section 6103(f) of the Internal Revenue Code of 1986 [26 U.S.C.A. § 6103(f)], nothing in this section or in any other provision of this Act shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof.

(f) As used in this section—

(1) the term "questioned cost" means a cost that is questioned by the Office because of—

(A) an alleged violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the expenditure of funds;

(B) a finding that, at the time of the audit, such cost is not supported by adequate documentation; or

(C) a finding that the expenditure of funds for the intended purpose is unnecessary or unreasonable;

(2) the term "unsupported cost" means a cost that is questioned by the Office because the Office found that, at the time of the audit, such cost is not supported by adequate documentation;

(3) the term "disallowed cost" means a questioned cost that management, in a management decision, has sustained or agreed should not be charged to the Government;

(4) the term "recommendation that funds be put to better use" means a recommendation by the Office that funds could be used more efficiently if management of an establishment took actions to implement and complete the recommendation, including—

(A) reductions in outlays;

(B) deobligations of funds from programs or operations;

(C) withdrawal of interest subsidy cost on loans or loan guarantees, insurance, or bonds;

(D) costs not incurred by implementing recommended improvements related to the opera-

tions of the establishment, a contractor or grantee;

(E) avoidance of unnecessary expenditures noted in preaward reviews of contract or grant agreements; or

(F) any other savings which are specifically identified;

(5) the term "management decision" means the evaluation by the management of an establishment of the findings and recommendations included in an audit report and the issuance of a final decision by management concerning its response to such findings and recommendations, including actions concluded to be necessary; and

(6) the term "final action" means—

(A) the completion of all actions that the management of an establishment has concluded, in its management decision, are necessary with respect to the findings and recommendations included in an audit report; and

(B) in the event that the management of an establishment concludes no action is necessary, final action occurs when a management decision has been made.

(As amended Pub.L. 97-252, Title XI, § 1117(c), Sept. 8, 1982, 96 Stat. 752; Pub.L. 100-504, Title I, §§ 102(g), 106(c), (d), Oct. 18, 1988, 102 Stat. 2521, 2527.)

§ 6. Authority of Inspector General; information and assistance from Federal agencies; unreasonable refusal; office space and equipment; Senior Executive Service positions

(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized—

(1) to have access to all records, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act;

(2) to make such investigations and reports relating to the administration of the programs and operations of the applicable establishments as are, in the judgment of the Inspector General, necessary or desirable;

(3) to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State, or local governmental agency or unit thereof;

(4) to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: *Provided*, That procedures other than subpenas shall be used by the Inspector General to obtain documents and information from Federal agencies;

(5) to administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the functions assigned by this Act, which oath, affirmation, or affidavit when administered or taken by or before an employee of an Office of Inspector General designated by the Inspector General shall have the same force and effect as if administered or taken by or before an officer having a seal;

(6) to have direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act;

(7) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of Title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

(8) to obtain services as authorized by section 3109 of Title 5, United States Code, at daily rates not to exceed the equivalent rate prescribed for grade GS-18 of the General Schedule by section 5332 of Title 5, United States Code; and

(9) to the extent and in such amounts as may be provided in advance by appropriations Acts, to enter into contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act.

(b)(1) Upon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested, furnish to such Inspector General, or to an authorized designee, such information or assistance.

(2) Whenever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circum-

stances to the head of the establishment involved without delay.

(c) Each head of an establishment shall provide the Office within such establishment with appropriate and adequate office space at central and field office locations of such establishment, together with such equipment, office supplies, and communications facilities and services as may be necessary for the operation of such offices, and shall provide necessary maintenance services for such offices and the equipment and facilities located therein.

(d) For purposes of the provisions of title 5, United States Code, governing the Senior Executive Service, any reference in such provisions to the "appointing authority" for a member of the Senior Executive Service or for a Senior Executive Service position shall, if such member or position is or would be within the Office of an Inspector General, be deemed to be a reference to such Inspector General.

(As amended Pub.L. 100-504, Title I, §§ 107, 110(a), Oct. 18, 1988, 102 Stat. 2528, 2529.)

§ 7. Complaints by employees; disclosure of identity; reprisals

(a) The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

(b) The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.

(c) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to any Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

§ 8. Additional provisions with respect to the Inspector General of the Department of Defense

(a) No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.

(b)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Secretary of Defense with respect to audits or investigations, or the issuance of subpoenas, which require access to information concerning—

(A) sensitive operational plans;

(B) intelligence matters;

(C) counterintelligence matters;

(D) ongoing criminal investigations by other administrative units of the Department of Defense related to national security; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described in paragraph (1) the Secretary of Defense may prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any

subpoena, after the Inspector General has decided to initiate, carry out or complete such audit or investigation or to issue such subpoena, if the Secretary determines that such prohibition is necessary to preserve the national security interests of the United States.

(3) If the Secretary of Defense exercises any power under paragraph (1) or (2), the Inspector General shall submit a statement concerning such exercise within thirty days to the Committees on Armed Services and Governmental Affairs of the Senate and the Committee on Armed Services and Government Operations of the House of Representatives and to other appropriate committes or subcommittees of the Congress.

(4) The Secretary shall, within thirty days after submission of a statement under paragraph (3), transmit a statement of the reasons for the exercise of power under paragraph (1) or (2) to the Committee on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and Government Operations of the House of Representatives and to other appropriate committees or subcommittees.

(c) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall—

(1) be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department.

(2) initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate;

(3) provide policy direction for audits and investigations relating to fraud, waste, and abuse and program effectiveness;

(4) investigate fraud, waste, and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate;

(5) develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs;

(6) monitor and evaluate the adherence of Department auditors to internal audit, contract audit, and internal review principles, policies, and procedures;

(7) develop policy, evaluate program performance, and monitor actions taken by all components of the Department in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States;

(8) request assistance as needed from other audit, inspection, and investigative units of the Department of Defense (including military departments); and

(9) give particular regard to the activities of the internal audit, inspection, and investigative units of the military departments with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) Notwithstanding section 4(d), the Inspector General of the Department of Defense shall expeditiously report suspected or alleged violations of chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to the Secretary of the military department concerned or the Secretary of Defense.

(e) For the purposes of section 7, a member of the Armed Forces shall be deemed to be an employee of the Department of Defense, except that, when the Coast Guard operates as a service of another department or

agency of the Federal Government, a member of the Coast Guard shall be deemed to be an employee of such department or agency.

(f)(1) Each semiannual report prepared by the Inspector General of the Department of Defense under section 5(a) shall include information concerning the numbers and types of contract audits conducted by the Department during the reporting period. Each such report shall be transmitted by the Secretary of Defense to the Committees on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and Government Operations of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(2) Any report required to be transmitted by the Secretary of Defense to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified in such section, to the Committees on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and Government Operations of the House of Representatives.

(g) The provisions of section 1385 of title 18, United States Code, shall not apply to audits and investigations conducted by, under the direction of, or at the request of the Inspector General of the Department of Defense to carry out the purposes of this Act.

(As amended Pub.L. 97-252, Title XI, § 1117(b), Sept. 8, 1982, 96 Stat. 751; Pub.L. 100-504, Title I, § 110(b), Oct. 18, 1988, 102 Stat. 2529.)

§ 8A. Special provisions relating to the Agency for International Development

(a) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Agency for International Development—

(1) shall supervise, direct, and control all security activities relating to the programs and operations of that Agency, subject to the supervision of the Administrator of that Agency; and

(2) to the extent requested by the Director of the United States International Development Cooperation Agency (after consultation with the Administrator of the Agency for International Development), shall supervise, direct, and control all audits, investigative, and security activities relating to programs and operations within the United States International Development Cooperation Agency.

(b) In addition to the Assistant Inspector Generals provided for in section 3(d) of this Act, the Inspector General of the Agency for International Development shall, in accordance with applicable laws and regulations governing the civil service, appoint an Assistant Inspector General for Security who shall have the responsibility for supervising the performance of security activities relating to programs and operations of the Agency for International Development.

(c) The semiannual reports required to be submitted to the Administrator of the Agency for International Development pursuant to section 5(b) of this Act shall also be submitted to the Director of the United States International Development Cooperation Agency.

(d) In addition to the officers and employees provided for in section 6(a)(6) of this Act, members of the Foreign Service may, at the request of the Inspector General of the Agency for International Development, be assigned as employees of the Inspector General. Members of the Foreign Service so assigned shall be responsible solely to the Inspector General, and the Inspector General (or his or her designee) shall prepare the performance evaluation reports for such members.

(e) In establishing and staffing field offices pursuant to section 6(c) of this Act, the Administrator of the Agency for International Development shall not be bound by overseas personnel ceilings established under the Monitoring Overseas Direct Employment policy.

(f) The reference in section 7(a) of this Act to an employee of the establishment shall, with respect to the Inspector General of the Agency for International Development, be construed to include an employee of or under the United States International Development Cooperation Agency.

(g) The Inspector General of the Agency for International Development shall be in addition to the officers provided for in section 624(a) of the Foreign Assistance Act of 1961 [22 U.S.C.A. § 2384(a)].

(h) As used in this Act, the term "Agency for International Development" includes any successor agency primarily responsible for administering part I of the Foreign Assistance Act of 1961 [22 U.S.C.A. § 2151 et seq.].

(Added Pub.L. 97-113, Title VII, § 705(a)(3), Dec. 29, 1981, 95 Stat. 1544.)

§ 8B. Special provisions concerning the Nuclear Regulatory Commission

(a) The Chairman of the Commission may delegate the authority specified in the second sentence of section 3(a) to another member of the Nuclear Regulatory Commission, but shall not delegate such authority to any other officer or employee of the Commission.

(b) Notwithstanding sections 6(a)(7) and (8), the Inspector General of the Nuclear Regulatory Commission is authorized to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers and duties of the Office of Inspector

General and to obtain the temporary or intermittent services of experts or consultants or an organization thereof, subject to the applicable laws and regulations that govern such selections, appointments and employment, and the obtaining of such services, within the Nuclear Regulatory Commission.

(Added Pub.L. 100-504, Title I, § 102(f), Oct. 18, 1988, 102 Stat. 2517.)

§ 8C. Special provisions concerning the Department of the Treasury

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Secretary of the Treasury with respect to audits or investigations, or the issuance of subpenas, which require access to sensitive information concerning—

(A) ongoing criminal investigations or proceedings;

(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;

(D) deliberations and decisions on policy matters, including documented information used as a basis for making policy decisions, the disclosure of which could reasonably be expected to have a significant influence on the economy or market behavior;

(E) intelligence or counterintelligence matters; or

(F) other matters the disclosure of which would constitute a serious threat to national security or to the protection of any person or property authorized protection by section 3056 of title 18, United States Code, section 202 of title 3, United States Code, or any provision of the Presidential Protection Assist-

ance Act of 1976 (18 U.S.C. 3056 note; Public Law 94-524).

(2) With respect to the information described under paragraph (1), the Secretary of the Treasury may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpena, if the Secretary determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent significant impairment to the national interests of the United States.

(3) If the Secretary of the Treasury exercises any power under paragraph (1) or (2), the Secretary of the Treasury shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Operations and Ways and Means of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of the Treasury shall have oversight responsibility for the internal investigations performed by the Office of Internal Affairs of the Bureau of Alcohol, Tobacco and Firearms, the Office of Internal Affairs of the United States Customs Service, and the Office of Inspections of the United States Secret Service, and the internal audits and internal investigations performed by the Office of Assistant Commissioner (Inspection) of the Internal Revenue Service. The head of each such office shall promptly report to the Inspector General the significant activities being carried out by such office.

(c) Notwithstanding subsection (b), the Inspector General may initiate, conduct and supervise such audits and investigations in the Department of the Treasury (including the bureaus and services referred to in subsection (b)) as the Inspector General considers appropriate.

(d) If the Inspector General initiates an audit or investigation under subsection (c) concerning a bureau or service referred to in subsection (b), the Inspector General may provide the head of the office of such bureau or service referred to in subsection (b) with written notice that the Inspector General has initiated such an audit or investigation. If the Inspector General issues a notice under the preceding sentence, no other audit or investigation shall be initiated into the matter under audit or investigation by the Inspector General and any other audit or investigation of such matter shall cease.

(e)(1) The Inspector General shall have access to returns and return information as defined in section 6103 (b) of the Internal Revenue Code of 1986, only in accordance with the provisions of section 6103 of such Code [26 U.S.C.A. § 6103] and this act.

(2) Access by the Inspector General to returns and return information under section 6103(h)(1) of such Code shall be subject to the following additional requirements:

> (A) In order to maintain internal controls over access to returns and return information, the Inspector General, or in the absence of the Inspector General, the Acting Inspector General, the Deputy Inspector General, the Assistant Inspector General for Audits, or the Assistant Inspector General for Investigations, shall provide to the Assistant Commissioner (Inspection) of the Internal Revenue Service written notice of the Inspector General's intent to access returns and return information. If the Inspector General determines that the Inspection Serv-

ice of the Internal Revenue Service should not be made aware of a notice of access to returns and return information, such notice shall be provided to the Senior Deputy Commissioner of Internal Revenue.

(B) Such notice shall clearly indicate the specific returns or return information being accessed, contain a certification by the Inspector General, or in the absence of the Inspector General, the Acting Inspector General, the Deputy Inspector General, the Assistant Inspector General for Audits, or the Assistant Inspector General for Investigations, that the returns or return information being accessed are needed for a purpose described under section 6103 (h)(1) of the Internal Revenue Code of 1986, and identify those employees of the Office of Inspector General of the Department of the Treasury who may receive such returns or return information.

(C) The Internal Revenue Service shall maintain the same system of standardized records or accounting of all requests from the Inspector General for inspection or disclosure of returns and return information (including the reasons for the dates of such requests), and of returns and return information inspected or disclosed pursuant to such requests, as described under section 6103(p)(3)(A) of the Internal Revenue Code of 1986. Such system of standardized records or accountings shall also be available for examination in the same manner as provided under section 6103(p)(3) of the Internal Revenue Code of 1986.

(D) The Inspector General shall be subject to the same safeguards and conditions for receiving returns and return information as are described under section 6103(p)(4) of the Internal Revenue Code of 1986.

(f) An audit or investigation conducted by the Inspector General shall not affect a final decision of the Secre-

tary of the Treasury or his delegate under section 6406 of the Internal Revenue Code of 1986 [26 U.S.C.A. § 6406].

(g) Notwithstanding section 4(d), in matters involving chapter 75 of the Internal Revenue Code of 1986 [26 U.S.C.A. §§ 7201 to 7487], the Inspector General shall report expeditiously to the Attorney General only offenses under section 7214 of such Code [26 U.S.C.A. § 7214], unless the Inspector General obtains the consent of the Commissioner of Internal Revenue to exercise additional reporting authority with respect to such chapter.

(h) Any report required to be transmitted by the Secretary of the Treasury to the appropriate committees or subcommittees of the Congress under section 5(d) shall be transmitted, within the seven-day period specified under such section, to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Operations and Ways and Means of the House of Representatives.

(Added Pub.L. 100-504, Title I, § 102(f), Oct. 18, 1988, 102 Stat. 2518.)

§ 8D. Special provisions concerning the Department of Justice

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpenas, which require access to sensitive information concerning—

(A) ongoing civil or criminal investigations or proceedings;

(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;

(D) inteiligence or counterintelligence matters; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described under paragraph (1), the Attorney General may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpena, if the Attorney General determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent the significant impairment to the national interests of the United States.

(3) If the Attorney General exercises any power under paragraph (1) or (2), the Attorney General shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Judiciary of the Senate and the Committees on Government Operations and Judiciary of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of Justice—

(1) may initiate, conduct and supervise such audits and investigations in the Department of Justice as the Inspector General considers appropriate;

(2) shall give particular regard to the activities of the Counsel, Office of Professional Responsibility of the Department and the audit, internal investigative, and inspection units outside the Office of Inspector

General with a view toward avoiding duplication and insuring effective coordination and cooperation; and

(3) shall refer to the Counsel, Office of Professional Responsibility of the Department for investigation, information or allegations relating to the conduct of an officer or employee of the Department of Justice employed in an attorney, criminal investigative, or law enforcement position that is or may be a violation of law, regulation, or order of the Department or any other applicable standard of conduct, except that no such referral shall be made if the officer or employee is employed in the Office of Professional Responsibility of the Department.

(c) Any report required to be transmitted by the Attorney General to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on the Judiciary and Governmental Affairs of the Senate and the Committees on the Judiciary and Government Operations of the House of Representatives.

(Added Pub.L. 100-504, Title I, § 102(f), Oct. 18, 1988, 102 Stat. 2520.)

§ 8E. Requirements for Federal entities and designated Federal entities

(a) Notwithstanding section 11 of this Act, as used in this section—

(1) the term "Federal entity" means any Government corporation (within the meaning of section 103(1) of title 5, United States Code), any Government controlled corporation (within the meaning of section 103(2) of such title), or any other entity in the Executive branch of the Government or any independent regulatory agency, but does not include—

(A) an establishment (as defined under section 11(2) of this Act) or part of an establishment;

(B) a designated Federal entity (as defined under paragraph (2) of this subsection) or part of a designated Federal entity;

(C) the Executive Office of the President;

(D) the Central Intelligence Agency;

(E) the General Accounting Office; or

(F) any entity in the judicial or legislative branches of the Government, including the Administrative Office of the United States Courts and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol;

(2) the term "designated Federal entity" means ACTION, Amtrak, the Appalachian Regional Commission, the Board of Governors of the Federal Reserve System, the Board for International Broadcasting, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Corporation for Public Broadcasting, the Equal Employment Opportunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Election Commission, the Federal Home Loan Bank Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Legal Services Corporation, the National Archives and Records Administration, the National Credit Union Administration, the National Endowment for the Arts, the National Endowment for the Humanities, the National Labor Relations Board, the National Science Foundation, the Panama

Canal Commission, the Peace Corps, the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission, the Smithsonian Institution, the Tennessee Valley Authority, the United States International Trade Commission, and the United States Posal Service;

(3) the term "head of the Federal entity" means any person or persons designated by statute as the head of a Federal entity, and if no such designation exists, the chief policymaking officer or board of a Federal entity as identified in the list published pursuant to subsection (h)(1) of this section;

(4) the term "head of the designated Federal entity" means any person or persons designated by statute as the head of a designated Federal entity and if no such designation exists, the chief policymaking officer or board of a designated Federal entity as identified in the list published pursuant to subsection (h)(1) of this section, except that with respect to the National Science Foundation, such term means the National Science Board;

(5) the term "Office of Inspector General" means an Office of Inspector General of a designated Federal entity; and

(6) the term "Inspector General" means an Inspector General of a designated Federal entity.

(b) No later than 180 days after October 18, 1988, there shall be established and maintained in each designated Federal entity an Office of Inspector General. The head of the designated Federal entity shall transfer to such office the offices, units, or other components, and the functions, powers, or duties thereof, that such head determines are properly related to the functions of the Office of Inspector General and would, if so transferred, further the purposes of this section. There shall not be

transferred to such office any program operating responsibilities.

(c) Except as provided under subsection (f) of this section, the Inspector General shall be appointed by the head of the designated Federal entity in accordance with the applicable laws and regulations governing appointments within the designated Federal entity.

(d) Each Inspector General shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to, or be subject to supervision by, any other officer or employee of such designated Federal entity. The head of the designated Federal entity shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpena during the course of any audit or investigation.

(e) If an Inspector General is removed from office or is transferred to another position or location within a designated Federal entity, the head of the designated Federal entity shall promptly communicate in writing the reasons for any such removal or transfer to both Houses of the Congress.

(f)(1) The Chief Postal Inspector of the United States Postal Service shall also hold the position of Inspector General of the United States Postal Service, and for purposes of this section, shall report to, and be under the general supervision of, the Postmaster General of the United States Postal Service. The Postmaster General, in consultation with the Governors of the United States Postal Service, shall appoint the Chief Postal Inspector. The Postmaster General, with the concurrence of the Governors of the United States Postal Service, shall have power to remove the Chief Postal Inspector or transfer the Chief Postal Inspector to another position or location within the United States Postal Service. If the Chief Postal Inspector is removed or transferred in accord-

ance with this subsection, the Postmaster General shall promptly notify both Houses of the Congress in writing of the reasons for such removal or transfer.

(2) For purposes of paragraph (1), the term "Governors" has the same meaning as such term is defined under section 102(3) of title 39, United States Code.

(g)(1) Sections 4, 5, 6 (other than subsections (a)(7) and (a)(8) thereof), and 7 of this Act shall apply to each Inspector General and Office of Inspector General of a designated Federal entity and such sections shall be applied to each designated Federal entity and head of the designated Federal entity (as defined under subsection (a)) by substituting—

(A) "designated Federal entity" for "establishment"; and

(B) "head of the designated Federal entity" for "head of the establishment".

(2) In addition to the other authorities specified in this Act, an Inspector General is authorized to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization thereof, subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the designated Federal entity.

(3) Notwithstanding the last sentence of subsection (d) of this section, the provisions of subsection (a) of section 8C (other than the provisions of subparagraphs (A), (B), (C), and (E) of subsection (a)(1)) shall apply to the Inspector General of the Board of Governors of the Federal Reserve System and the Chairman of the Board of Governors of the Federal Reserve System in the same manner as such provisions apply to the Inspector

General of the Department of the Treasury and the Secretary of the Treasury, respectively.

(h)(1) No later than April 30, 1989, and annually thereafter, the Director of the Office of Management and Budget, after consultation with the Comptroller General of the United States, shall publish in the Federal Register a list of the Federal entities and designated Federal entities and the head of each such entity (as defined under subsection (a) of this section).

(2) Beginning on October 31, 1989, and on October 31 of each succeeding calendar year, the head of each Federal entity (as defined under subsection (a) of this section) shall prepare and transmit to the Director of the Office of Management and Budget and to each House of the Congress a report which—

(A) states whether there has been established in the Federal entity an office that meets the requirements of this section;

(B) specifies the actions taken by the Federal entity otherwise to ensure that audits are conducted of its programs and operations in accordance with the standards for audit of governmental organizations, programs, activities, and functions issued by the Comptroller General of the United States, and includes a list of each audit report completed by a Federal or non-Federal auditor during the reporting period and a summary of any particularly significant findings; and

(C) summarizes any matters relating to the personnel, programs, and operations of the Federal entity referred to prosecutive authorities, including a summary description of any preliminary investigation conducted by or at the request of the Federal entity concerning these matters, and the prosecutions and convictions which have resulted.

(Added Pub.L. 100-504, Title I, § 104(a), Oct. 18, 1988, 102 Stat. 2522.)

§ 8F. Rule of construction of special provisions

The special provisions under section 8, 8A, 8B, 8C, or 8D of this Act relate only to the establishment named in such section and no inference shall be drawn from the presence or absence of a provision in any such section with respect to an establishment not named in such section or with respect to a designated Federal entity as defined under section 8E(a).

(Added Pub.L. 100-504, Title I, § 105, Oct. 18, 1988, 102 Stat. 2525.)

§ 9. Transfer of functions

(a) There shall be transferred—

(1) to the Office of Inspector General—

(A) of the Department of Agriculture, the offices of that department referred to as the "Office of Investigation" and the "Office of Audit";

(B) of the Department of Commerce, the office of that department referred to as the "Office of Audits" and the "Investigations and Inspections Staff" and that portion of the office referred to as the "Office of Investigations and Security" which has responsibility for investigation of alleged criminal violations and program abuse;

(C) of the Department of Defense, the offices of that department referred to as the "Defense Audit Service" and the "Office of Inspector General, Defense Logistics Agency", and that portion of the office of that department referred to as the "Defense Investigative Service" which has responsibility for the investigation of alleged criminal violations;

(D) of the Department of Education, all functions of the Inspector General of Health, Education, and Welfare or of the Office of Inspector General of Health, Education, and Welfare relating to functions transferred by section 301 of the Department of Education Organization Act [20 U.S.C.A. § 3441];

(E) of the Department of Energy, the Office of Inspector General (as established by section 208 of the Department of Energy Organizations Act) [42 U.S.C.A. former § 7138];

(F) of the Department of Health and Human Services, the Office of Inspector General (as established by title II of Public Law 94-505) [42 U.S.C.A. former §§ 3521-3527];

(G) of the Department of Housing and Urban Development, the office of that department referred to as the "Office of Inspector General";

(H) of the Department of the Interior, the office of that department referred to as the "Office of Audit and Investigation";

(I) of the Department of Justice, the offices of that Department referred to as (i) the "Audit Staff, Justice Management Division", (ii) the "Policy and Procedures Branch, Office of the Comptroller, Immigration and Naturalization Service", the "Office of Professional Responsibility, Immigration and Naturalization Service", and the "Office of Program Inspections, Immigration and Naturalization Service", (iii) the "Office of Internal Inspection, United States Marshals Service", (iv) the "Financial Audit Section, Office of Financial Management, Bureau of Prisons" and "Office of Inspections, Bureau of Prisons", and (v) from the Drug

Enforcement Administration, that portion of the "Office of Inspections" which is engaged in internal audit activities, and that portion of the "Office of Planning and Evaluation" which is engaged in program review activities;

(J) of the Department of Labor, the office of that department referred to as the "Office of Special Investigations";

(K) of the Department of Transportation, the Offices of that department referred to as the "Office of Investigations and Security" and the "Office of Audit" of the Department, the "Offices of Investigations and Security, Federal Aviation Administration", and "External Audit Divisions, Federal Aviation Administration", the "Investigations Division and the External Audit Division of the Office of Program Review and Investigation, Federal Highway Administration", and the "Office of Program Audits, Urban Mass Transportation Administration";

(L) of the Department of the Treasury, the office of that department referred to as the "Office of Inspector General", and, notwithstanding any other provision of law, that portion of each of the offices of that department referred to as the "Office of Internal Affairs, Bureau of Alcohol, Tobacco, and Firearms", the "Office of Internal Affairs, United States Customs Service", and the "Office of Inspections, United States Secret Service" which is engaged in internal audit activities;

(M) of the Environmental Protection Agency, the offices of that agency referred to as the "Office of Audit" and the "Security and Inspection Division";

(N) of the Federal Emergency Management Agency, the office of that agency referred to as the "Office of Inspector General";

(O) of the General Services Administration, the offices of that agency referred to as the "Office of Audits" and the "Office of Investigations";

(P) of the National Aeronautics and Space Administration, the offices of that agency referred to as the "Management Audit Office" and the "Office of Inspections and Security";

(Q) of the Nuclear Regulatory Commission, the office of that commission referred to as the "Office of Inspector and Auditor";

(R) of the Office of Personnel Management, the offices of that agency referred to as the "Office of Inspector General", the "Insurance Audits Division, Retirement and Insurance Group", and the "Analysis and Evaluation Division, Administration Group";

(S) of the Railroad Retirement Board, the Office of Inspector General (as established by section 23 of the Railroad Retirement Act of 1974);

(T) of the Small Business Administration, the office of that agency referred to as the "Office of Audits and Investigations"; and

(U) of the Veterans' Administration, the offices of that agency referred to as the "Office of Audits" and the "Office of Investigations"; and

(2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly re-

lated to the functions of the Office and would, if so transferred, further the purposes of this Act,

except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

(b) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, of any office or agency the functions, powers, and duties of which are transferred under subsection (a) are hereby transferred to the applicable Office of Inspector General.

(c) Personnel transferred pursuant to subsection (b) shall be transferred in accordance with applicable laws and regulations relating to the transfer of functions except that the classification and compensation of such personnel shall not be reduced for one year after such transfer.

(d) In any case where all the functions, powers, and duties of any office or agency are transferred pursuant to this subsection, such office or agency shall lapse. Any person who, on the effective date of this Act [Oct. 1, 1978], held a position compensated in accordance with the General Schedule, and who, without a break in service, is appointed in an Office of Inspector General to a position having duties comparable to those performed immediately preceding such appointment shall continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of service in the new position.

(As amended Pub.L. 96-88, Title V, § 508(n)(2), Oct. 17, 1979, 93 Stat. 694; Pub.L. 97-252, Title XI, § 1117(a)(2), (3), Sept. 8, 1982, 96 Stat. 750; Pub.L. 100-504, Title I, § 102(d), Oct. 18, 1988, 102 Stat. 2516.)

§ 10. Conforming and technical amendments

[Section amended sections 5315 and 5316 of Title 5, Government Organization and Employees, and section 3522 of Title 42, The Public Health and Welfare, which amendments have been executed to text.]

§ 11. Definitions

As used in this Act—

(1) the term "head of the establishment" means the Secretary of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Labor, State, Transportation, Veterans' Affairs, or the Treasury; the Attorney General; the Administrator of the Agency for International Development, Environmental Protection, General Services, National Aeronautics and Space, or Small Business; the Director of the Federal Emergency Management Agency, the Office of Personnel Management or the United States Information Agency; the Chairman of the Nuclear Regulatory Commission or the Railroad Retirement Board; as the case may be;

(2) the term "establishment" means the Department of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, Veteran's Affairs, or the Treasury; the Agency for International Development, the Environmental Protection Agency, the Federal Emergency Management Agency, the General Services Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Office of Personnel Management, the Railroad Retirement Board, the Small Business Administration, or the United States Information Agency; as the case may be;

(3) the term "Inspector General" means the Inspector General of an establishment;

(4) the term "Office" means the Office of Inspector General of an establishment; and

(5) the term "Federal agency" means an agency as defined in section 552(e) of Title 5 (including an establishment as defined in paragraph (2)), United States Code, but shall not be construed to include the General Accounting Office.

(As amended Pub.L. 96-88, Title V, § 509(n)(3), (4), Oct. 17, 1979, 93 Stat. 695; Pub.L. 97-113, Title VII, § 705(a)(2), Dec. 29, 1981, 95 Stat. 1544; Pub.L. 97-252, Title XI, § 1117(a)(4), (5), Sept. 8, 1982, 96 Stat. 750; Pub.L. 99-93, Title I, § 150(a)(2), Aug. 16, 1985, 99 Stat. 427; Pub.L. 99-399, Title IV, § 412(a)(2), Aug. 27, 1986, 100 Stat. 867; Pub.L. 100-504, Title I, § 102(c), Oct. 18, 1988, 102 Stat. 2515; Pub.L. 100-527, § 13(h)(2), (3), Oct. 25, 1988, 102 Stat. 2643.)

§ 12. Effective date

The provisions of this Act and the amendments made by this Act [see section 10 of this Act] shall take effect October 1, 1978.

APPENDIX F

RULES OF CRIMINAL PROCEDURE
III. INDICTMENT AND INFORMATION

Rule 6. The Grand Jury

(a) Summoning Grand Juries.

(1) Generally. The court shall order one or more grand juries to be summoned at such time as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors. The court may direct that alternative jurors may be designated at the time a grand jury is selected. Alternate jurors in the order in which they were designated may thereafter be impanelled as provided in subdivision (g) of this rule. Alternate jurors shall be drawn in the same manner and shall have the same qualifications as the regular jurors, and if impanelled shall be subject to the same challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors

(b) Objections to Grand Jury and to Grand Jurors.

(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to Dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualifications of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U.S.C. § 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreperson and Deputy Foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purposes of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any

recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government

in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by the rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is

the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is nec-

essary to prevent disclosure of matters occurring before a grand jury.

(f) Finding and Return of Indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreperson shall so report to a federal magistrate in writing forthwith.

(g) Discharge and Excuse. A grand jury shall serve until discarged by the court, but no grand jury may serve more than 18 months unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 26, 1976, eff. Aug. 1, 1976; July 30, 1977, Pub.L. 95-78, § 2(a), 91 Stat. 319; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983; Pub.L. 98-473, Title II, § 215(f), Oct. 12, 1984, 98 Stat. 2016; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987.)